

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

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DONALD GLEN ESTES,

Plaintiff,

vs.

SOUTHERN NEVADA ADULT MENTAL  
HEALTH; DR. RAMIREZ; DR. SHERKS; DR.  
LEMMONS,

Defendants.

Case No.: 2:04-cv-00149-RLH-GWF

**ORDER**

(Motion to Set Aside Default—#71, #72; &  
Motion for Default Judgment—#78)

Before the Court is Defendants Dr. Ramirez and Dr. Lemmons' **Motion to Set Aside Entry of Default** (#71 & 72), filed September 9, 2006. The Court has also considered Plaintiff's Opposition (#79), filed October 3, 2006, and Defendants' Reply (#80), filed October 5, 2006.

Also before the Court is Plaintiff's Motion for Default Judgment (#78), filed October 3, 2006.

**BACKGROUND**

This case came before the Court in February 2004. Since the beginning of the case Plaintiff has had a difficult time serving a summons upon all of the Defendants. Specifically, Plaintiff could not locate Doctors Ramirez, Sherks, and Lemmons. After multiple efforts, which

1 the Court believed satisfied the due diligence standard, the Court issued an order on December 13,  
 2 2005, which granted service by publication. Plaintiff decided to only perform service by  
 3 publication on Doctors Ramirez and Lemmons. On February 27, 2006, the Court issued a follow  
 4 up order to move this process along, and to assure Plaintiff that any delays had been resolved.  
 5 Pursuant to this order, the U.S. Marshals Service advertised process on March 1, 8, 15, and 22,  
 6 2006, in the Las Vegas Review Journal. On April 6, 2006, service by publication was completed  
 7 for Doctors Ramirez and Lemmons.

8 On September 5, 2006, Plaintiff made a motion for Clerk's Entry of Default. In  
 9 Plaintiff's motion for Clerk's Entry of Default he quoted a letter received from Counsel  
 10 representing Dr. Ramirez wherein Plaintiff was asked to forward "all future correspondence and  
 11 pleadings in this matter" to the appropriate office. On September 5, 2006, the Clerk filed an Entry  
 12 of Default as to Defendants Dr. Ramirez and Dr. Lemmons (collectively "Defendants").

13 The next day, September 6, 2006, the Motion to Set Aside Entry of Default  
 14 ("Motion") was filed on behalf of Defendants in this case.

## 15 DISCUSSION

### 16 Motion to Set Aside Entry of Default

17 Defendants move the Court to set aside the default judgment pursuant to FRCP  
 18 55(c) and Nevada Supreme Court Rule 175. The Court notes that Nevada Supreme Court Rules  
 19 150 through 203.5 were repealed as of May 1, 2006. What was Rule 175 became Nevada Rule of  
 20 Professional Conduct 3.5A, which states: "When a lawyer knows or reasonably should know the  
 21 identity of a lawyer representing an opposing party, he or she should not take advantage of the  
 22 lawyer by causing any default or dismissal to be entered without first inquiring about the opposing  
 23 lawyer's intention to proceed." This Court may set aside an entry of default judgment "[f]or good  
 24 cause shown." Fed. R. Civ. P. 55(c).

25 Defendants argue that good cause has been shown because Plaintiff has violated  
 26 NRPC 3.5A by not inquiring about the opposing lawyer's intention to proceed. Plaintiff seems to

1 admit as much in his response to Defendants' Motion. Also, Plaintiff was obviously aware of the  
2 Defendants' counsel because Plaintiff's motion for the Clerk to enter default quotes Defendants'  
3 letter notifying Plaintiff of who would be representing Dr. Ramirez in this case.

4           The Court notes that the August 10, 2006, letter only states that Dr. Ramirez is  
5 being represented by Counsel. As such, Defendants have failed to show any evidence that Plaintiff  
6 was aware that Dr. Lemmons was also represented by Counsel as of September 5, 2006. This, as  
7 well as other shortcomings in Defendants' Motion and Reply cause the Court some concern.  
8 Defendants state in their motion that "[t]he record of this matter indicates that a certain amount of  
9 latitude has been given to accommodate Plaintiff's Pro-Se status. Defendants now respectfully  
10 request accommodation for Defendants and their newly retained counsel. . . ." (Defs'. Mot. to Set  
11 Aside Default, 4.) The Court is disappointed and concerned that a licensed attorney would  
12 compare her situation to an inmate proceeding in forma pauperis and pro se. The Court simply  
13 sees no reason that Defendants' Counsel and Plaintiff should continue requiring equal leniency.  
14 For now the Court admonishes counsel for Dr. Ramirez and Dr. Lemmons to strive for a higher  
15 level of performance since she is an officer of the Court and thus reasonably held to a higher  
16 standard. The Court also notes that Defendants still have not filed an answer to Plaintiff's  
17 complaint.

18           The Nevada Supreme Court has held the language currently in NRPC 3.5A to  
19 require one party to notify the opposing party before entering default. *Cen Val Leasing Corp. v.*  
20 *Bockman*, 668 P.2d 1074 (Nev. 1983). In *Cen Val Leasing Corp.*, the Nevada Supreme Court held  
21 that because one party failed to notify the other before seeking default, "the district court was  
22 required to set aside the default." *Id.* The Court holds in its discretion, and limits its holding to  
23 this specific case, that had Plaintiff contacted Defendants' Counsel, Plaintiff may have been put on  
24 notice as to Counsel's intent to proceed as to both Dr. Ramirez and Dr. Lemmons. The Court  
25 notes that Defendants did at least move quickly after default was entered against them. As such,  
26 the Court will grant Defendants' Motion as to both Defendants.

1 **Conflict of Interest**

2 The District of Nevada requires that a practicing attorney “adhere to the standards  
3 of conduct prescribed by the Model Rules of Professional Conduct as adopted and amended from  
4 time to time by the Supreme Court of Nevada, except as such may be modified by this court.” LR  
5 IA 10-7. NRPC 1.7 (formerly Rule 157 of the NSCR) regarding conflicts of interests requires a  
6 lawyer to receive informed consent, in writing, when concurrently representing clients whose  
7 interests may be in conflict. Nev. R. Prof’l Conduct 1.7.

8 Due to the potential conflict of interest that exists between Doctors Ramirez and  
9 Lemmons (i.e. if they choose to blame each other for the alleged harm to plaintiff), the Court  
10 orders Counsel to submit to the Court, within twenty (20) days from the date of this Order, a  
11 written acknowledgment and waiver of any conflict of interest signed by her clients.

12 **CONCLUSION**

13 Accordingly, and for good cause appearing,

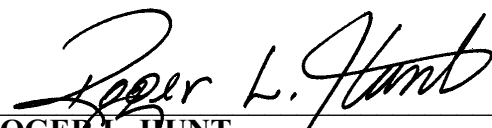
14 IT IS HEREBY ORDERED that Defendants’ Motion to Set Aside Entry of Default  
15 (#71) is GRANTED.

16 IT IS FURTHER ORDERED that Plaintiff’s Motion for Default Judgment (#78) is  
17 DENIED as moot.

18 IT IS FURTHER ORDERED that Defendants Dr. Ramirez and Dr. Lemmons shall  
19 file their answer to Plaintiff’s complaint within twenty (20) days of the entry of this order.

20 IT IS FURTHER ORDERED that Defendants’ Counsel submit a written  
21 acknowledgment and waiver of the conflict of interest within twenty (20) days from entry of this  
22 Order.

23 Dated: November 3, 2006.

24   
25 **ROGER L. HUNT**  
26 **United States District Judge**